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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 774

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

—v.—

GENERAL ELECTRIC COMPANY and IVAN C. McLEOD, Regional Director of the Second Region of the National Labor Relations Board.

MEMORANDUM OF GENERAL ELECTRIC COMPANY IN OPPOSITION

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GENERAL ELECTRIC COMPANY and IVAN C. McLEOD, Regional Director of the Second Region of the National Labor Relations Board.

MEMORANDUM OF GENERAL ELECTRIC COMPANY IN OPPOSITION

Statement of the Case

Preliminary Statement

The petition of International Union of Electrical, Radio and Machine Workers, AFL-CIO (the "IUE" or the "Union"), is the second petition for certiorari in this proceeding, the first having been filed by the Solicitor General on October 7, 1966 (No. 645, O. T. 1966; the "Solicitor's Petition"). We will not repeat the arguments set forth in our Memorandum in Opposition in No. 645, all of which are applicable here, but respectfully refer this Court to

that Memorandum for our discussion, *inter alia,* of the underlying facts, the issue as presented to the courts below, and the opinions below.

This Memorandum will be limited to a response to the attempt by the IUE, whose very right to be a party in this proceeding is doubtful,* to lend the appearance of signifi-

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* The granting of intervenor status to the IUE resulted from its *ex parte* motion to the Court of Appeals. The IUE did not seek intervention in the District Court but, instead sought and was granted limited rights of "participation" in that Court. Counsel for IUE recognized that such limited "participation" did not make IUE "a party, giving me access to the appellate processes of the Court." (S.M. 24-25).

Although we do not believe the question to be of sufficient importance to warrant our filing of a certiorari petition, since IUE is admittedly trying merely to proliferate the issues raised in the Solicitor's Petition (Pet. p. 10), we consider it appropriate to point out that the right of IUE to intervene herein is highly questionable and entails undesirable consequences.

One highly undesirable result flowing from the charging parties' intervention in a Section 10(j) proceeding is highlighted in the instant case, in which a stay was granted at the request of the Solicitor General on condition that he file a petition for certiorari by October 24, 1966. That condition was in effect circumvented by the Union's filing of its own petition on November 15, 1966. Since, as we were advised by the Clerk of the Court, both petitions will be submitted jointly to the Court after the time to respond to IUE's petition has elapsed, the filing of the IUE petition effectively nullified the intent of the Justice granting the stay to assure that a request for review, if any, would be expedited.

In any event, it has been held that the charging party has no right to intervene in a proceeding under §10(j) of the Act, 29 U. S. C. §160(j), because such a proceeding results from a discretionary administrative determination without any right by the charging party to limit such discretion. *Reynolds* v. *Marlene Industries Corp.*, 250 F. Supp. 722 (S. D. N. Y. 1966); *Penello* v. *Burlington Industries,* —— F. Supp. ——, 54 LRRM 2165 (W. D. Va. 1963); see *Clothing Workers* v. *Richman Bros.*, 348 U. S. 511, 517 (1955). The Board has consistently supported this position, as it did here (S.M. 29).

This conclusion is supported by the language of Section 10(1) of the Act, 29 U. S. C. §160(1), which *requires* the Board to seek injunctive relief in certain specified situations. In that Section Congress provided that the charging party "be given an op-

cance and complexity to a case that is basically simple and essentially moot.

Questions Presented

As pointed out in our Memorandum in No. 645 (pp. 7-8), the position of the Government with regard to the criteria governing Section 10(j) proceedings changed as this case progressed to this Court, and the issue of whether equitable relief is "just and proper" * was somehow transformed into the issue of whether "the impact on the public interest will be substantial if relief is withheld" (Solicitor's Petition, p. 2).

Even this shift in position by the Government, however, does not satisfy the IUE. Instead, in an admitted effort further to expand the issues (Pet. p. 10), it seeks to recast the issue raised by the first criterion from the question of "reasonable cause to believe" that a violation of the Act has been committed, to one that not even the Board has suggested, i.e., "a reasonable *possibility*, that the Board's complaint will ultimately be sustained" (Pet. Questions 1-3, pp. 2-3).

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portunity to appear by counsel and present any relevant testimony." No such right was given in a Section 10(j) proceeding. Nor does this Court's decision in *Auto Workers* v. *Scofield* and *Auto Workers* v. *Fafnir Bearing Co.*, 382 U. S. 205 (1965) require a different result. Those cases arose under Section 10(f) of the Act, 29 U. S. C. §160(f) which grants persons aggrieved by a "final order of the Board" the right to participate in the review of that final order. Here, however, there has been neither full hearing nor a "final order" of the Board; but merely an administrative determination to proceed under Section 10(j).

* Section 10(j); and see the Labor Board's memoranda to the courts below quoted in our Memorandum in Opposition in No. 645 (p. 7).

In addition, the IUE would have this Court review factual findings (Question 3) and statements by the Court below which were not the basis of its determination herein (Question 4). Such matters clearly do not warrant review. See *infra*, pp. 12 to 14.

From the foregoing it would seem that the "conglomeration" attributed by the IUE to the Court of Appeals (Pet. p. 9) is more aptly descriptive of the attempt of the IUE Petition to compound the issues herein and of its "concern" that the Solicitor General has not "adequately" presented the issues (Pet. p. 10).

We believe the only questions presented by this petition are those presented at page 8 of our Memorandum in Opposition in No. 645 and should be answered as suggested there.*

As indicated above, we will limit our discussion primarily to facts arising subsequent to the Solicitor's Petition which further manifest the mootness of this proceeding and to matters particularly applicable to the IUE Petition.

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* We do not consider it appropriate in this Memorandum to respond to IUE's assertions with regard to the underlying controversy to be tried by the Labor Board and its citation of authority in support thereof (Pet. pp. 6-7, 13, 17-19). We note only that the basic legal question on which the claimed violation depended, as indicated by the Court of Appeals, "is a difficult one to resolve and one which no court has considered." It is in a developing field of law wherein the precedent nearest to the case at bar is a Labor Board decision which is about to be but has not yet been reviewed by the Court of Appeals for the Sixth Circuit (*American Radiator & Standard Sanitary Corp.*, 155 NLRB No. 69, 60 LRRM 1385 [1965]). The novelty of the question is attested by the close interest of the labor bar in the ultimate resolution of the *American Radiator* case (1966 *Report of the Section of Labor Relations Law of the American Bar Ass'n*, p. 422).

ARGUMENT

I

This case has become moot.

On October 14, 1966, the Company and the Union's Negotiating Committee jointly announced agreement on a new contract to succeed the contract which expired on October 2, 1966. This agreement successfully concluded the negotiations which were the subject of this proceeding (Petition under Section 10(j), par. 4; 11a). On October 16, 1966, the Union formally ratified the settlement. Thereafter a formal agreement was prepared and signed on October 28, thus concluding national contract negotiations until October 26, 1969.

The Solicitor admits that "the case has lost the urgency that moved us to apply to this Court for a stay of the court of appeals' judgment" (Solicitor's Reply in No. 645, p. 2). He and the IUE assert, however, in their replies in case No. 645,* that the execution of the contract is not sufficient to render this case moot, because there is an asserted continuing obligation to bargain with regard to matters which allegedly have not been fully resolved by the negotiated collective bargaining agreement.

The controlling consideration relied upon by the Board and the IUE, and which moved the District Court to issue the injunction, was to compel the Company to remain at

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* Without having been named a party to the Solicitor's Petition, or in any other way making its appearance previously known to the Company, the IUE submitted a "Reply" to the Solicitor's petition relating to the Company's assertion that the case is moot.

the bargaining table in order to reach the agreement which was successfully concluded on October 14, 1966. Thus:

(1) The Board in its Brief on Appeal to the Court of Appeals stated (pp. 37-38):

> "As the record shows, unless the parties begin negotiations, it is likely that a strike by the approximately 80,000 people represented by IUE will occur. . . . It is equally reasonable to anticipate that the consequences resulting from such a strike would have a serious impact upon the various communities in which General Electric has plants or other facilities and upon the national defense."

(2) The IUE in its Brief to the Court of Appeals stated (p. 55):

> "On the other hand, the failure to grant the relief requested is fraught with danger to the public interest, and could . . . enhance the possibility of a strike if no negotiations take place between now and the expiration of the current agreement."

(3) Finally, it was the threat of a Company-wide strike purportedly resulting from the possibility that negotiations would not take place with regard to the contract which expired on October 2, 1966, which served as a basis for the District Court injunction (676a, 683a).

The preliminary injunction order must be read in the context of the opinion of the District Court. *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 130 (1945). *Cf.* Rule 52(a) F. R. C. P. The "decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought . . ." *Terminal R. Assn.* v.

U. S., 266 U. S. 17, 29 (1924). In light of the emphasis placed by the Board, IUE and the District Court on the need for an injunction to bring about negotiations for a renewal of the contract which expired on October 2, the execution of such a contract plainly fulfilled the purpose of this preliminary proceeding. (See authorities cited in our Memorandum in Opposition in No. 645, pp. 11-12.)

II

The issues sought to be raised by the IUE do not merit review by this Court.

In our Memorandum in No. 645 we demonstrated that this case never presented any question requiring or calling for review by this Court (pp. 12-16).

In its first two questions, IUE asserts that the sole test for a Section 10(j) injunction is whether there is a "reasonable possibility that the Board's complaint will ultimately be sustained" (Pet. pp. 2-3). If there is a possibility, argues the IUE, then "any continued violation of the law which deprives employees of their rights under the Act during the processing of a case by the Board, affords sufficient basis for the issuance of the injunction, without need to prove any additional impact on the public interest" (Pet. p. 10).

IUE thus with one stroke would (1) fundamentally alter the Board's latest suggested criterion of impact on the public interest; (2) eliminate the standard which the Board itself deemed appropriate in the petition to the District Court when it alleged that the acts complained of constituted "flagrant" unfair labor practices (13[a]); (3) disregard the public declarations of the Board and other authorities

(which even the IUE cites [Pet. pp. 21-22]) to the effect that Section 10(j) was intended to be used "not as a broad sword, but as a scalpel" in cases of "flagrant" acts and "wilful and calculated violations"*; (4) nullify the safeguards set forth in Section 10(j) of "just and proper"; (5) challenge the general principles governing Section 10(j) injunctions announced by the Court of Appeals for the Second Circuit almost ten years ago;** and (6) eradicate all consideration of the criteria traditionally considered by courts of equity in determining whether a preliminary injunction should issue (Pet. Question 3, p. 3).

The Norris-LaGuardia Act, 29 U. S. C. §101 *et seq.*, withdraws from the District Court's jurisdiction the power to grant injunctions in labor disputes except in strictly limited circumstances. In the original Wagner Act of 1935, the provisions of the Norris-LaGuardia Act were made inapplicable to certain Board proceedings (Section 10[h]). Section 10(j), however, was enacted in 1947 and in perhaps an abundance of caution, Congress restored therein the "jurisdiction" which was removed from the federal courts in the Norris-LaGuardia Act by providing that the courts

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* See Twenty-seventh Annual Report of the Board, p. 4 (1962); Statement of Frank W. McCulloch, Chairman of the National Labor Relations Board, *The National Labor Relations Board* in Action, before the Eighth Annual Joint Industrial Relations Conference, Michigan State University, April 19, 1962; Statement of Board Member Fanning, before the Ninth Annual Industrial Relations Conference of Electronic Industries Association, March 1962, and Report of Subcommittee on NLRB of the House Committee on Education and Labor, Administration of the Labor-Management Relations Act by the NLRB, 87th Cong., 1st Sess. (Committee Print, September 1961) which is quoted on pp. 21-22 of the IUE Petition.

** *Douds* v. *International Longshoremen's Association*, 241 F. 2d 278 (2d Cir., 1957).

"shall have *jurisdiction* to grant to the Board such temporary relief or restraining order as it deems *just and proper.*" (Emphasis supplied.)

The phrasing of §10(j) in terms of a jurisdictional grant clearly indicates that all that was intended was the empowering of the District Court to issue injunctions in certain limited types of labor disputes and that something more than a "reasonable possibility" of violation of the Act is needed before a Section 10(j) injunction can be issued. "A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances." *Hecht Company* v. *Bowles*, 321 U. S. 321, 329 (1943).

Indeed, the very use of the words "jurisdiction" and "just and proper" mandate the application of the general equitable principles which IUE (and the Board in No. 645) seek to avoid.

In *Brotherhood of Railroad Trainmen* v. *Chicago River R. Co.*, 353 U. S. 30 (1957), this Court held that in order to vindicate the processes of the Railway Labor Act, a strike by railroad employees over a "minor dispute" was subject to injunctive relief. Thereafter, in *Brotherhood of Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U. S. 528 (1960), the issue arose as to "whether the injunction granted the Railroad may be qualified by conditions imposed by the District Court under traditional equitable considerations". This Court held that such considerations as preservation of a *status quo* and irreparable injury *must* be taken into consideration in determining the propriety of an injunction, stating (at 531-2):

> "If the District Court is free to exercise the typical powers of a court of equity, it has the power to impose

> conditions requiring maintenance of the *status quo*. Conditions of this nature traditionally may be made the price of relief when the injunctive powers of the court are invoked and the conditions are necessary to do justice between the parties. 'The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. . . . [The court] will avoid . . . injury so far as may be, by attaching conditions to the award. . . .' Yakus v. United States, 321 U. S. 414, 440. '[I]t is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all . . . whose interests the injunction may affect.' Inland Steel Co. v. United States, 306 U. S. 153, 157. Since the power to condition relief is essential to ensure that extraordinary equitable remedies will not become the engines of injustice, it would require the clearest legislative direction to justify the truncation of that power.
>
> Such direction, if it exists, presumably must be derived from the Railway Labor Act itself, and since that Act contains no express provisions circumscribing the equitable powers of the court, such limitations, if any, must be created by clear implication."

This Court found no clear implication in the Railway Labor Act compelling the District Court to issue injunctions without regard to the equitable consideration which courts have traditionally taken into account, and there are no such express provision or clear implication in Section 10(j) which mandate the elimination of the courts' traditional role.

The irreconcilability of the principles expressed in the *M-K-T* case with the view of the law which IUE seeks to present for review here is readily apparent. There is no room under the doctrine of that case for reviewing now the decision of the Court of Appeals that the equitable considerations which had been held not controlling by the District Court must be considered and, when so considered, required the denial of the injunction.

See also, *United Railroad Workers* v. *Baltimore & O. R. Co.*, 364 U. S. 278 (1960); *Hecht Company* v. *Bowles*, 321 U. S. 321 (1943).

The attempt by IUE to analogize Section 10(j) to preliminary injunctions provided for in other federal acts is without substance. No such analogy exists. Thus, the preliminary injunction provided in the Civil Rights Act, 42 U. S. C. §1971(c), and that contained in the statute involved in *SEC* v. *Capital Gains Bureau*, 375 U. S. 180 (1963) (viz.: 15 U. S. C. §80b-9) both of which are heavily relied upon by IUE (Pet. pp. 10-14), are not issued preliminarily to any administrative determination. Under those acts, and others relied upon by the IUE, it is the court and not an administrative body which is entrusted to make both the first and the ultimate determination of illegality.

In addition statutes such as those involved in the *Capital Gains* case contain no limitation that an injunction is to be issued only where the court finds such issuance "just and proper" but, on the contrary, require only a "showing" that the prohibited act has or will be committed.

Finally, four of the statutes, relating to such matters as Fur and Wool Products Labeling, 15 U. S. C. 69g(b) (2), 15 U. S. C. §68(e), Textile Fiber Products Identification, 15 U. S. C. §70(f) and False Advertising, 15 U. S. C. §53,

specifically provide that injunctive relief is appropriate where it is in "the public interest" or in "the interest of the public".

Accordingly, not one of the 25 statutes relied upon by the IUE (Pet. App. A) has even a superficial resemblance to Section 10(j).

Moreover, the field of labor relations is quite distinguishable from other areas. Cf. *United Steel Workers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578 (1960). Obviously, the acts sought to be analogized by IUE do not have the background of a Norris-LaGuardia Act which "explicitly formulated the 'public policy of the United States' in regard to the industrial conflict" and which must be read as a "harmonizing text" with other labor statutes. Cf. *United States* v. *Hutcheson*, 312 U. S. 219, 231 (1941). These statutes, therefore, present no reason for granting certiorari.*

We now turn to the two remaining questions for which the IUE seeks review.

Almost ten years ago the Court of Appeals for the Second Circuit laid down the general principles governing applications for Section 10(j) injunctions, viz.: "reasonable

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* Although, as we have demonstrated above, the statutes cited by the IUE are in no wise relevant to this case, we find it interesting that one of the page references to the legislative history of the Civil Rights Act upon which IUE relies (103 Cong. Rec. 5764) contains the following statement by Charles H. Slayman, Chief Counsel and Staff Director of the Senate Judiciary Subcommittee on Constitutional Rights:

> "(a) In an equity proceeding, the plaintiff, whether it be a private person or the Government, must satisfy the historical requisites for equity jurisdiction. He must show irreparable injury and the inadequacy of the remedy at law. The court has a much broader discretion to deny the requested relief than it has in actions at law."

cause to believe" and "just and proper". *Douds* v. *International Longshoremen's Association,* 241 F. 2d 278 (2d Cir. 1957). Without claiming that the principles of those cases were not applied herein, the Union's attempt to challenge those cases by suggesting that any claimed violation of the National Labor Relations Act as amended triggers and in effect compels a Section 10(j) injunction, if it has reasonable "possibility" of success, is plainly specious and raises no legitimate question for review. The Union's subsidiary effort to have this Court review whether the considerations of *status quo* and irreparable injury were properly weighed and assessed (answered in our Memorandum in Opposition in No. 645, pp. 13-15) runs afoul of this Court's long standing rule that it will "not grant a certiorari to review evidence and discuss specific facts". *United States* v. *Johnston,* 268 U. S. 220, 227 (1925).

Finally, the Union's fourth assertion (Pet. Question 4, p. 3) is answered in our Memorandum in Opposition in No. 645 (pp. 15-16). Moreover, it is clear from the opinion of the Court of Appeals that the expedition of proceedings before the Board was not relied upon as a *basis* for its reversal but as a response to the Board's bootstrap doctrine that a preliminary injunction should be issued because it failed to proceed with dispatch to an ultimate determination. Thus, the portion of the opinion of the court below wherein this matter was discussed succeeds that portion of the opinion holding that the District Court erred and is also prefaced by the sentence: "Nor are we moved to affirm the grant of an injunction because the Board's procedures may be slow and tortuous". This Court has consistently refused to grant certiorari to review such reasoning which is merely collateral and not the basis of the decision for which review is sought. *Tyrrell* v. *District of Columbia,* 243 U. S. 1, 5-6 (1917).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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